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NO. 84-773

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does the Establishment Clause require that denial of permission to meet during regular school hours of compulsory attendance to a student initiated and composed group, supervised by a school teacher, meeting on public secondary school property in school rooms, and wishing to meet for religious exercise, including prayer, during the first classroom period of the day on two days per week when student clubs having a direct or indirect relation to the curriculum and which promote the intellectual, physical and social development of students, meet?

2. Was a generally open forum created for indiscriminate speech during the club period at Williamsport Area High School?

PARTIES TO THE PROCEEDING

The parties to the proceeding as originally instituted are set forth in the caption of the case. (P. App. 1a)[1]

The Williamsport Area School District did not appeal from the judgment of the District Court. This appeal was taken by Respondent herein. However, the School District will be affected by the decision in this case.[2]

[1]Bender, Braggs, Robert, Kriner, Hunter, and Herzog graduated within one week after this suit was instituted (June 2, 1982). Seevers, Strayer, Brossman, and Marshall, graduated in June of 1983.

On November 30, 1983, Petitioners moved to add Plaintiffs Michael Bender, Michele Marshall, Julie Hobart, Jeffery Fredroff, Brian Foelsch, Julie, Kim, and Heidi Ulmer, and Petros an unincorporated association. This motion was granted by the Court of Appeals in its Opinion (P. App., 4a). Some of these new Plaintiffs are presently students at the school.

[2]The school board voted 8-1 not to appeal (Respondent dissenting). The school

district has not participated in this appeal, although it has abided by the decision of the District Court until revised by the Court of Appeals, and now is abiding by the decision of the Court of Appeals. Petros has not met during the 1984-85 school year.

TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF CONSTITUTIONAL PROVISION INVOLVED	1
COUNTER STATEMENT OF THE CASE	2
A. Procedural History	2
B. Statement of Facts	11
A. The Proposed Activity	11
B. The Activity	16
C. Generally	24
SUMMARY OF ARGUMENT	26
ARGUMENT	31
I. ALLOWING THE PROPOSED CLUB VIOLATES THE ESTABLISHMENT CLAUSE	32

Page

A. The primary effect of the policy is to advance religion objectively 40

1. The club must be approved by the State 40

2. The State provides an audience for proselytization and financially supports the club 42

3. The State gives the club special treatment 43

4. The State advises and therefore promotes the club 44

B. The primary effect of the policy is to advance religion subjectively 44

Page

secondary school children are young and impressionable 44

2. Teachers are role models and proselytization will occur 50

3. The students have already been accommodated .. 55

C. The policy produces excessive entanglement of government and religion 56

1. Teacher supervision ... 57

2. Divisiveness .. 58

3. Religious domination 59

D. The Purpose Test .. 61

Page

II. THERE HAS BEEN NO FREE SPEECH RIGHT CREATED IN THE MEMBERS OF PETROS TO CONDUCT RELIGIOUS EXERCISE DURING THE CLUB PERIOD AT WILLIAMSPORT AREA HIGH SCHOOL 67

A. No open forum was created 71

B. Widmar v. Vincent does not control this case 82

C. The curriculum related standard of the Court of Appeals is not the standard for determining whether an open forum has been created 84

III. THE ALTERNATIVE SUGGESTED BY PETITIONERS FOR PERMITTING THE ACTIVITY WOULD NOT ALTER THE VIOLATION OF THE ESTABLISHMENT CLAUSE PRESENT 87

Page

IV. ASSUMING THAT AN OPEN FORUM WAS CREATED, THE COURT OF APPEALS' REASONING WITH REGARD TO RESOLVING THE CONFLICT BETWEEN THE FREE SPEECH AND ESTABLISHMENT CLAUSES SHOULD BE ADOPTED 90

CONCLUSION 92

TABLE OF AUTHORITIES

	Page
CASES:	
Adderly v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966)	71
Bender v. Williamsport Area School District, 563 Fed. Sup., 697 (MDPA 1983)	3
Board of Education v. Pico, 457 U.S. 853, 863-864 (1982)	76,77
Brandon v. Board of Education of Guilderland Central Schools, 635 F. 2d 971, 974 (CA 2 1980); 454 U.S. 1123 (1981); 455 U.S. 983 (1982)	36,37, 38,48, 57
CF. Minnesota Board for Community Colleges v. Knight, 52 U.S. Law Week 4204, 4207-4210 4207-4210 U.S., standard (1984)	81

	Page
Cantwell v. Connecticut, 310 U.S. 296 (1940)	53
Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973)	59
Engel v. Vitale, 370 U.S. 421,82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)	4,6,43
Epperson v. Arkansas, 393 U.S. 97 at 106	50
Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972) ..	73
Greer v. Spock, 424 U.S. 828 at 836, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976)	71,73
Illinois Ex Rel McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948)	5,34, 42,59
Jaffree v. Board of School Commissioners, ____ U.S. ____ (June 4, 1985); 53 U.S. Law Week 4665	40

	Page
Johnson v. Huntington Beach Union High School District, 137 Cal. Rptr. 43, 68 Ca. App. 3d 1; 434 U.S. 877 (1977)	37,48, 57
Karen B. v. Treen, 653 Fed. 2d 897 (CA 5 1981); 454 U.S. 913 (1982)	33
Lehman v. Shaker Heights, 418 U.S. 298 (1974)	73,81
Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)	8,26, 29,34, 40,56, 58,65
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038; 680 F. 2d 424 (5th Circuit 1982); 103 S. Ct. 800 (1983)	37,48, 57
Lynch v. Donnelly, 104 S. Ct. 1355 (1984	40,62

	Page
Marsh v. Chambers, 103 S. Ct. 3330 (1983)	62
McDaniel v. Paty, 435 U.S. 613, 626 (1978)	52
Mueller v. Allen, 103 Supreme Ct. 3062, 3069 (1983).	43,59
Nartowicz v. Clayton County School District, 736 F. 2d 646 (CA 11 1984)....	37,48
Perry Education Assocation v. Perry Local Educators Association, 460 U.S. 37, 45 (1983)	72,73, 75,79, 81,84
Plyler v. Doe, 457 U.S. 202,221-23 (1982)	77
School District of Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1964)	5,6,35, 38,42, 50
Stone v. Graham, 499 U.S. 39 (1980)	49

Page

Tilton v. Richardson, 403 U.S. 672, 686 (1971) 44,84

United States Postal Service v. Counsel of Greenburgh Civil Associations, 453 U.S. 114, 131, 132 (1981) 74

Wallace v. Jaffree, (_____ U.S. _____ at _____, 53 U.S. Law Week 4680, 4681) 32,31, 33,46, 63,64

Widmar v. Vincent, 454 U.S. 263, 102 S.Ct., L. Ed. 2d 440 (1981) 4,9,29, 46,59, 62,63, 82,84

Zorach v. Clouson, 343 U.S. 306 (1952) 55,89, 90

741 Fed. 2d, 538 (CA 3 1984).. 7

741 F. 2d at 544, 548 69

STATUTES

Pa. Stat. Ann. tit. 24, §§15-15-4 to 1504 (Purdon Supp. 1983) 19

Page

25 P.S. Sec. 2811(a) 47

11 P.S. Sec. 1901 47

42 U.S.C. 1973 bb to
1973 bb - 1 47

MISCELLANEOUS

92 Yale Law Journal 499 (1984). 46

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

COUNTER STATEMENT OF CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Respondent does not agree that the Equal Access Act, Title VIII of Public Law 98-377, enacted on August 11, 1984, is applicable to this case.

COUNTER STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The original Plaintiffs filed suit on June 2, 1982, prior to the end of the school year, against the Williamsport Area School District, the superintendent, the principal of the high school and each school board member in his individual and school board member capacity (J.A. 13). The suit was for injunctive and civil rights damage relief based on an alleged violation of the First Amendment of the

United States Constitution by the Williamsport Area School District. The alleged violation was the denial of the exercise of freedom of speech and the free exercise of their religion without regulation or restriction by the State imposed on the basis of the content of the speech (J.A. 17, 18). After answer by the Defendants, the filing of depositions and affidavits both, the Defendants and Plaintiffs on July 19, 1982 and July 28, 1982, moved, pursuant to F.R.C.P. 56, for summary judgment (J.A. 35, 50). On May 12, 1983, the District Court filed an Opinion. Bender v. Williamsport Area School District, 563 Fed. Sup., 697 (MDPA 1983), in which it granted summary judgment for Defendants on Petitioners free exercise claim, and granted summary

judgment for Plaintiffs on their freedom of speech claim and against Defendants on the establishment of religion defense.

The District Court relied heavily on the case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) which it believed could not be meaningfully distinguished from the case at bar. In fact, the Court believed that if the case at bar did not involve a high school, Widmar would be controlling. The Court, recognizing that the case was not free from doubt, emphasized the crucial nature of the facts (P. App. 101a).

With respect to the Establishment Clause defense, the Court distinguished the cases of Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), The School

District of Abbington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1964), and Illinois Ex Rel McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), on the ground that the religious activity was required by the State and that it took place en masse (P. App. 95a). The Court further indicated that the organization was willing to occupy a less favorable position among the various other clubs (P. App. 96a) on the basis that it would not use the bulletin boards or public address system and was not asking for an advisor, but merely a monitor, which would monitor order (policeman in the park) (P. App. 100a). However, the Court did not as part of its decision preclude advisor status for the teacher (P. App.

99a 100a). The Court noted that high school students have become more advanced in the twenty years since the Engel and Abbington cases, supra, (P. App. 94a).

On June 10, 1983, an appeal from the Order of the District Court was taken to the United States Court of Appeals for the Third Circuit by John C. Youngman, Jr., one of the members of the school board of the Williamsport Area School District, Respondent herein.[3]

[3]Respondent left the School Board in December, 1983 at a time when he had a child in ninth grade at the high school. At all relevant times and at present, Respondent has had a child who was and is a student at the high school, Benjamin Antes Youngman. Since the school board voted 8-1 not to take the appeal, Respondent, as an individual party, sued individually, would have standing as parent and guardian of his son to challenge the decision of the lower Court, inasmuch as the public body was not properly challenging the lower Court

Petitioners did not appeal to the Circuit Court from the grant of summary judgment to Defendants on Petitioners' free exercise claim, and the Court of Appeals did not consider the claim in its Opinion.

On July 24, 1984, the Third Circuit Court of Appeals filed an Opinion (741 Fed. 2d, 538 (CA 3 1984) in which it affirmed the District Court's holding that the students had a valid First Amendment interest to engage in their proposed activity on the grounds of

decision. Additionally, a successor of Respondent, Reverend David L. Phillips, has agreed to be substituted for Respondent in his public official capacity for purposes of this appeal pursuant to Supreme Court Rule 40. He also is Respondents' minister. Finally, Respondent is not liable for counsel fees, a motion for which is being held in abeyance pending the outcome of this

freedom of speech. The Circuit Court then held with respect to the establishment defense that the second and third prongs of the test enunciated in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971) were violated, that the primary effect of the proposed activity was to advance religion and that there was excessive entanglement of the government with religion.

appeal (J.A. 152-155). For these reasons and the reasons set forth in the Brief of the United States at page 5, footnote 5, the case remains justiceable, both with respect to standing and mootness. In addition, on the question of mootness, the Circuit Court held that the failure to certify the class made the case capable of repetition yet evading review (P. App. 4a). Thus, the Court granted Petitioners' motion to add parties Plaintiff without objection.

The Court of Appeals distinguished the Widmar case on the basis that high school students were less mature and more impressionable than university students (P. App. 25a) and would be less able to appreciate that permission for Petros was granted out of a spirit of neutrality rather than advancement. Also, the structured and controlled environment of a high school, including compulsory attendance as opposed to the more fluid environment of a college campus, was more likely to communicate a message of endorsement of religion (P. App. 26a). Further, there would be involuntary contact between non-participating students and religious groups using classrooms for meeting following which other classes would be

held therein (P. App. 26a). Additionally, the activity would be monitored by a teacher, parent or other adult. This adult, in the high school principal's view, was to be there as someone who would help the students (P. App. 26a). The combination of all these items would convey the perception that Williamsport was endorsing and encouraging religious practice (P. App. 27a).

All of the above factors were regarded by the Court of Appeals as also indicating an intimate and continuing relationship, amounting to excessive entanglement.

The Court then went on to reconcile the free speech and Establishment Clause provisions under the circumstances

of this case and concluded that since there was no free exercise problem, that the establishment problems outweighed the free speech problems in this case and reversed the decision of the District Court.

On August 15, 1984 the Third Circuit Court of Appeals denied a motion for rehearing and rehearing en banc. The Petition for Certiorari was filed by Petitioners herein on November 13, 1984 and certiorari was granted by this Court on February 20, 1985.

B. STATEMENT OF FACTS

A. THE PROPOSED ACTIVITY

The original Plaintiffs in this case, students at the Williamsport Area High School, sought to organize a group known as "Petros," which would "meet for

the purposes of [students] aiding each other in a social, emotional and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems and sharing of personal experiences." Complaint Paragraph 31 (J.A. 16). The Complaint also stated that "the Plaintiffs are Christians who believe they have a duty to perform all tasks in school to the glory of God, to pray during the day, including the school day, to worship with their fellow Christians and to share with each other how their religious faith aids them with their daily problems" (J.A. 18). The purpose of the club was also stated to school authorities in the application for approval (P. App. 5a, 6a):

PROPOSAL FOR A NEW STUDENT ORGANIZATION

NAME OF THE ORGANIZATION

Petros (the Rock)

NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

> Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

> Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

The students asked permission to meet during the school's regularly scheduled activity period. They were informed by the principal that they could not advertise their meetings either by announcing or posting announcements on bulletin boards (affidavit of Lisa Bender, J.A. 53).

Petros was allowed to hold one organizational meeting, at which approximately forty-five students were present. During the meeting, passages of scripture[4] were read, and students who wished to do so, prayed. After this first session, however, the school administration withheld permission for further meetings pending investigation as to their legality. After consultation with the school's attorney, the Williamsport School Board denied the student's request for permission to meet. The President of the School Board wrote to Bender, stating:

> The solicitor [has] advised the Board that to approve your pro-

[4]The record does not reveal from what source this scripture was derived.

> posal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.
>
> P. App. at 6a (Letter of R.F. Eberhart).

B. THE ACTIVITY

The activity period at Williamsport Area High School is held during a thirty minute time slot regularly provided on Tuesdays and Thursdays, during which student groups may conduct meetings.[5] The school day begins at 7:45

[5] Statutory provision for extracurricular activities in Pennsylvania public schools is contained in Pa. Stat. Ann. tit. 24, §§5-511 (Purdon 1962 & Supp. 1983), which provides:

a.m. when all students must be in their homerooms. School supervision of students begins the moment they enter the school premises. P. App. at 7a (Affidavit of Principal Wayne Newton). The activity period starts at 7:57 a.m., after attendance has been taken in homeroom and the school day has begun. Those students who do not par

(a) The board of school directors in every school district shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control, or prohibition of exercises, athletics, or games of any kind, school publications, debating, forensics, dramatic, musical, and other activities related to the school program, including raising and disbursing funds for any or all of such purposes and for scholarships, and (2) the organization, management, supervision, control, financing, or prohibition of organizations, clubs, societies and groups of the members of

ticipate in a club may study in the library, visit the school's computer station, examine career or college placement materials, or simply remain in their homerooms until the next class period begins. Participation in activities is voluntary, although each student must be

any class or school, and may provide for the suspension, dismissal, or other reasonable penalty in the case of any appointee, professional or other employe, or pupil who violates such rules or regulations.

....

(c) The board of school directors may permit the use of school property, real or personal, for the purpose of conducting any activity related to the school program, or by any school or class organization, club, society, or group, (2) authorize any school employe or employees to manage, supervise and control the development and conduct of any such activities, (3) employ or assign any school employee to serve in any capacity in connection with any such activities.

on school grounds and accounted for during the activity period. Pennsylvania law requires that students participate in a minimum amount of instruction per year, which is variously calculated as: (1) 180 school days per year, with each day consisting of seven hours, minus 1½ hours for lunch and breaks; (2) a school week consisting of 27½ hours of instruction; or (3) 990 hours of instruction each year. Pa. Stat. Ann. tit. 24, §§15-1504 to 1504 (Purdon Supp. 1983).[6]

[6]The record does not show whether the activity period counts toward the minimum requirement at Williamsport. However, the Pennsylvania State Department of Education has determined in Basic Education Circular 3-84 dated July 1, 1984, that "activities included as pupil instruction time are clubs, student councils and similar activities conducted during school hours." (Not part of the record).

P. App. 8a (affidavit of Principal Wayne Newton).

At the time of the application for Petros, approximately twenty-eight clubs were in existence[7].

[7] As described in a recent school yearbook, student clubs which are currently active include: Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The Cherry & White (student literary art magazine); Billtown Banner (student newspaper); La Memoire (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).

Other clubs which have been approved in the past and might be renewed if interest warranted are the Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs. App. at 367. (Affidavit of Principal W. Newton).

None of the clubs are what may be described as "controversial". The nature of the various clubs existing at Williamsport Area High School when this suit was instituted are set forth in the joint appendix at pages 109 through 141 inclusive. They are either directly or indirectly related to the curriculum at Williamsport Area High School. The Key Club, a service organization sponsored by Kiwanis International, the precise nature of which is set forth at pages 2 and 3 of the Brief as Amici Curiae, Kiwanis International and Key Club International, could be described as being

There is no formal mechanism or procedure for applying for school sponsorship or sanctioned status at Williamsport, other than oral and possibly written request as was done by the students wishing to have Petros recognized as a school activity. Id.

indirectly related to the curriculum inasmuch as no grades are given for service as such. However, annually at commencement, prizes for service of one kind or another are awarded.[8] Political clubs, religious clubs, and clubs of a controversial nature have not applied for admission to the activity period at Williamsport Area High School. What clubs are admitted is a matter ultimately for decision by the school board upon application.[9] Petros is the first club of a controversial or religious nature to have applied for admission to the activity period.

[8] At this year's commencement, Respondent counted eight separate prizes based in whole or in part on service.

[9] See Appellate Court Opinion (P. App. 7a, footnote 6).

The Williamsport School District has delegated responsibility for supervision of student clubs to the high school principal (J.A. 89). Williamsport High School's policy is to allow students to suggest topics for new clubs, subject to the official approval of the school's administrators (J.A. 64, 66). The principal's policy regarding proposed new clubs is that "[a]ny student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper would likely be approved as an officially sponsored and sanctioned school activity" (J.A. 104). Thus, approval of suggested clubs is not automatic; the school retains the prerogative

of rejecting clubs on a case-by-case basis. Furthermore, clubs which are approved are considered to be "sponsored and sanctioned" by the school.

Faculty advisors for student clubs are selected by the school administration on the basis of the connection between a faculty member's background and the subject matter of the club (J.A. 144). Therefore, the school attempts to provide each club with an advisor who has envinced a particular interest in the club's activities. Faculty advisors are expected to play an active role in the conduct of clubs, assisting students (J.A. 83) and keeping the administration informed of the club's activities (J.A. 76).

C. GENERALLY

The students were offered release time for their religious exercise by the school district (P. App. 71a, J.A. 39 Affidavit of Oscar W. Knade, Jr.) and Respondent's church offered its facilities and supervision for the activity. The students refused this offer; for what reason is not known. The implication of Petitioners that the size of the campus or its distance from facilities for religious exercise make the offer of release time is an empty offer should be disregarded, because the student may bring automobiles to the campus by special permission or their parents may drive them (Deposition of Newton J.A. 68). Furthermore, there is no evidence that the district made an offer which could not be accomplished.

The Court is requested to take judicial notice that students in grades nine through twelve are at a stage of their lives when they are most susceptible and subject to peer pressure.

SUMMARY OF ARGUMENT

The Court of Appeals was correct in finding that the introduction of a club devoted to religious exercise during the club period at Williamsport Area High School violated the Establishment Clause. This is because both the advancement of religion and excessive entanglement prongs of the Lemon v. Kurtzman test are violated. All of the Appellant Courts which have considered this issue thus far have so held.

This is another attempt to put organized religious exercise and prayer

into the public secondary school at a time when the students are compelled to be there by law. This attempt must fail because it is a violation of the Establishment Clause and because there is no free speech right in Petitioners.

The Establishment Clause is violated because the policy has the primary effect of advancing religion and creates an excessive entanglement of the government with religion. Further, the basic purpose of the Establishment Clause, to prevent devisiveness among the people, is undercut.

The primary effect of the policy would be to advance religion because the State approves the clubs and religious exer cises, including prayer, will be performed in the public schools during

the hours of compulsory attendance and be supervised by an advisor/monitor. The club will also be given special treatment not accorded other clubs, and if the teacher may only act as a monitor, there will be a perception of advancement of religion by immature and impressionable school children who are compelled to be in the area of the activity and who will be proselytized.

The policy will produce excessive entanglement of government and religion because it requires continuing teacher supervision for all of the reasons enunciated with respect to advancing religion. Further, the policy will divide children along religious lines and religious domination of the forum will be the result of the policy.

The first Lemon test is violated if the Court focuses on the proposed amendment to the policy. The Equal Access Act has no application to the case at bar but, if it does, it contains all of the problems heretofore mentioned, and in addition, violates all of the tests enunciated by Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971).

There is no free speech right involved because no open forum was created. The university situation present in the case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), is not controlling in the public secondary school situation.

No open forum has been created, because the school district has not given

up its right to determine what clubs shall be permitted, and the clubs permitted to date have been uncontroversial and designed to inculcate traditional values of a secular nature, promote educational skills or promote new fields of knowledge not yet made part of the curriculum for which credit is given toward graduation. No club has ever operated either administratively or procedurally as is proposed, and permitting this club to exist would lead eventually to religious domination of the club system.

The alternatives suggested by Petitioners do not address the Establishment Clause problems present.

If the Court holds that there is an open forum and that there is a violation of the Establishment Clause, then

the reasoning and result of the Third Circuit Court of Appeals with respect to the accommodation of the two clauses should be upheld.

ARGUMENT

Respondent agrees substantially with the position taken by Amici Kiwanis International and Key Club International with respect to the open forum question and by the American Jewish Congress in their Brief with respect to the Establishment Clause violation in this case. Respondent is also indebted to Ms. Ruti Teitel for her article "The Unconstitutionality of Equal Access Policies and Legislation allowing organized Student-Initiated Religious Activities in the Public High Schools: a Proposal for a Unitary First Amendment

Forum Analysis", to be published, which collects the many First Amendment cases applicable to the situation in the case at bar in a coherent way, together with their various discussions and holdings, so that somehow a Brief may be written on this subject within the perimeters set by the rules of the Supreme Court. The article gives a comprehensive overview of the legislative history of the Equal Access Act and thus should be of value in future cases before this Court.

This Brief will not attempt a comprehensive discussion of the legislative history of the First Amendment, such as is contained in the dissent of Mr. Justice Rehnquist in Wallace v. Jaffree, (_____ U.S. _____ at _____, 53 U.S. Law Week 4680, 4681) Respondent would only note the following:

1. The legislative history is fairly sparse and therefore subject to ambiguous construction;

2. If Representative Livermore's language had more than three-fifths of the House of Representatives in favor of it, why would Livermore and the others, without debate, have agreed to Madison's language with which they were originally unsatisfied. See Wallace v. Jaffree, Rehnquist J. dissenting, U.S. at 53 U.S. Law Week 4665 at 4681;

3. The constitution Pennsylvania of 1776 in effect when the First Amendment was adopted provided as follows with respect to religion:

> "Second. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of

> right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."

I. ALLOWING THE PROPOSED CLUB VIOLATES THE ESTABLISHMENT CLAUSE

Petitioners argue that there is no Establishment Clause violation, because the Establishment Clause has no application to speech made by students, but is applicable only to State speech. Petitioners' Brief page 18. First there is State speech involved in the case at bar, e.g. the advisor nature of the

teacher. Secondly, violations of the Establishment Clause do not depend solely on vocal speech, but also depend on actions and policies instituted. See e.g. Wallace v. Jaffree, ____ U.S. _____, 53 U.S. Law Week 4665 (June 4, 1985) (State statute permitting moment of silence allowing prayer unconstitutional) and Karen B. v. Treen, 653 Fed. 2d 897 (CA 5 1981), affirmed, 454 U.S. 913 (1982) (State allowing student initiated prayer unconstitutional). If Petitioners merely look to the policy or the statute as constituting the prohibited speech, then the policy of permitting the religious entity in the case at bar would also be State speech. Furthermore, it is the State actions in addition to any State statute involved that have been

looked in deciding that various State policies violated the Establishment Clause. See e.g. McCollum v. Board of Education, 333 U.S. 203 (1948) (State statute permitting outside religious teachers in the school for religious instruction during regular class hours invalidated on grounds that State premises, funded by tax dollars, were being used and that State policy provided by compulsion the audience for the instruction among other grounds).

The second of Petitioners' arguments, that the access desired in this case is consistent with the tri-partite test of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) is discussed at greater length, infra, in this Brief.

Respondent is an elder in the Presbyterian Church, the parent of four children three of whom have graduated and one of whom is presently attending Williamsport Area High School. Respondent was a member of the Board of Directors of the Williamsport Area School District for ten years until December of 1983. His church and supervision were offered for Petitioners' religious group to conduct religious exercise on a released time basis but this offer was refused. As such, he is in a somewhat unique position from which to evaluate the proposed religious entity vis-a-vis the school system.

The basic policies underlying the Establishment Clause of the Constitution are set forth in School

District of Abbington Township, Pennsylvania. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 1567 10 L. Ed. 2d 844 (1963), Brandon v. Board of Education of Guilderland Central Schools, 635 F. 2d 971, 974 (CA 2 1980 cert. denied), 454 U.S. 1123 (1981), rehearing denied, 455 U.S. 983 (1982). It is submitted that these policies, preservation of religious purity, preservation of the integrity of both religion and government, and preservation of the ability of both religion and government to prosper are violated by mandating the religious entity in the public secondary schools during hours of compulsory attendance under State supervision.

It is no accident that all of the appellate cases which have thus far

decided the issue, prohibit a religious club for religious exercise in the secondary public schools. Johnson v. Huntington Beach Union High School District, 137 Cal. Rptr. 43, 68 Cal. App. 3d 1, (cert. denied), 434 U.S. 877 (1977), Brandon v. Board of Education of Guilderland Central Schools, 635 F. 2d 971, 974 (CA 2 1980 cert. denied), 454 U.S. 1123 (1981), Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038, reh. denied, 680 F. 2d 424 (5th Circuit 1982), cert. denied, 103 S. Ct. 800 (1983), Nartowicz v. Clayton County School District, 736 F. 2d 646 (CA 11 1984) and the Court of Appeals in the case at bar. While these appellate cases do not control the case before this Court, they

should be carefully considered because they represent a unified result on the question of whether a religious club for religious exercise should be permitted in the secondary schools during the hours of compulsory attendance or before and after school. Much of the reasoning of these Courts is persuasive to Respondent and will be discussed, infra.

Already, the admonitions, set forth in Schempp and Brandon, supra., of Williams, Jefferson and Madison seem to have been, are being, or will be played out in the Williamsport Area School District if the religious entity is permitted as proposed. What does it say about the religious purity of youngsters who are accommodated by being offered released time, but refuse the offer?

What is the effect on the purity of their religiosity of opining about the maturity, impressionability and non-impressionability of children ages fourteen to eighteen?[10] Is the school district harmed in its educational mission by having to spend its time monitoring activities to see that no proselyti- zation occurs, and monitoring the media to see that they are not used for religious purposes? It has become abundantly clear to Respondent that neither religion nor education prosper in the atmosphere created by the object of this lawsuit, the injection of the proposed religious entity into the secondary public school system.

[10]See Legislative history of the Equal Access Act, U.S. Code Congressional and Administrative News, No. 7, Sept. 1984, pp. 2349-2396 incl. at p. 2357.

A. THE PRIMARY AFFECT OF THE POLICY IS TO ADVANCE RELIGION OBJECTIVELY.

Petitioners do not argue that the tri-partite type test enunciated in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971), is inapplicable to this case. Indeed this Court, while indicating that the test is not absolutely controlling in every case, has reaffirmed and used the test most recently in the case of Jaffree v. Board of School Commissioners, _____U.S. _____ (June 4, 1985); 53 U.S. Law Week 4665.

The Lemon test for advancement is both objective and subjective in nature. Lynch v. Donnelly, 104 S. Ct. 1355 (1984), (O'Connor J. concurring).

1. THE CLUB MUST BE APPROVED BY THE STATE.

The legal basis for clubs in the secondary schools of Pennsylvania is found in Acts of 1949, March 10, P.L. 30 Art. V. Sec. 511, 24 P.S. Sec. 5-511(a), which provides:

a. "The Board of school districts in every school district shall prescribe, adopt and enforce such reasonable rules and regulations as it may deem proper, regarding...

2. The organization, management, supervision, control, financing or prohibition or organizations, clubs..." (P. App. 7a Circuit Court Opinion Note 6).

To an objective observer a club may be prohibited and conversely a club may be organized. The State thus approves or disapproves any club. Permitting

Petros would be direct State approval of the club. Thus, the objective observer would observe State approval of the club activity.

2. THE STATE PROVIDES AN AUDIENCE FOR PROSELYTIZATION AND FINANCIALLY SUPPORTS THE CLUB.

By providing space, heat and light for the club there is no question of financial support. The State, in addition, pays the salary of the supervising teacher. Furthermore, the State provides the audience for the club through its compulsory attendance laws. The first and last of these factors was held in McCollum v. Board of Education, supra, to invalidate a statute providing for religious instruction in the schools.

In addition to the case at bar, the McCollum and Abington cases, supra,

also involved the use of the compulsory attendance laws to provide an audience. This point was also made in the case of Engel v. Vitale, 370 U.S. at 439. In the case at bar, the aid is direct aid to the religious activity, unlike the indirect aid present in the case of Mueller v. Allen, 103 Supreme Ct. 3062, 3069 (1983).

3. THE STATE GIVES THE CLUB SPECIAL TREATMENT.

By the special limitations on the proposed activity such as non-use of school media and the characterization of the teacher as a "monitor" an objective observer would conclude that there is something special about this club, which is not applicable to other clubs. Hence the conclusion of endorsement and advancement of religion by the State.

4. THE STATE ADVISES THE CLUB AND THEREFORE PROMOTES THE CLUB.

On the other hand, the lower Court did not take away the advisor status of the teacher in the case at bar (P. App. 99a, 100a). Thus, an objective observer would also conclude that advice in fact will be given to the students, and thus the State to an objective observer, is promoting the religious activity.

B. THE PRIMARY AFFECT OF THE POLICY IS TO ADVANCE RELIGION SUBJECTIVELY.

1. STUDENTS IN A PUBLIC SECONDARY HIGH SCHOOL ARE YOUNG AND IMPRESSIONABLE.

That students in a public high school are immature and impressionable has been stated and reiterated by this Court several times. Tilton v. Richardson, 403 U.S. 672, 686 (1971),

"There are generally significant

differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." Walz v. Tax Comm'n. supra, at 671, 90 S. Ct., at 1412. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students."

This fact was reiterated in the case of Widmar v. Vincent, 545 U.S. at 274 note 14 and Wallace v. Jaffree, ___ U.S. at _____ 53 U.S. Law Week 4677 (O'Connor J. concurring). That children age fourteen to eighteen are immature and impressionable can be determined from one's own observation. Legislative history of the Equal Access Act indicates attempts to build the case the other way through the use of students to opine that such is the case, and through the use of Law Review notes such as found in 92 Yale Law Journal 499 (1984). This note takes statements from psychological treatises out of context and concludes from those statements that children between the ages of fourteen and eighteen are not immature and not impressionable. In addition to

being opinions based on hearsay, it is apparent to Respondent that the authors of that note have never raised a child between the ages of fourteen and eighteen.

There are numerous examples of laws in our society which belie the notion of maturity and non-impressionability of children between the ages of fourteen and eighteen. For instance, a child is not treated as an adult by our juvenile justice laws. A child is not an adult prior to the age of eighteen. See e.g. 25 P.S. Sec. 2811(a) (Voting: 18 yrs.); 11 P.S. Sec. 1901 (18 and older - adult except where otherwise provided by law) 42 U.S.C. 1973 bb to 1973 bb - 1 (voting); U.S. Constitution, Amendment 26 (Voting). In the same year

that congress was passing the Equal Access Act, it afterward passed amendments to the child abuse laws, but retained a provision for those to be covered by the Act being children under the age of eighteen 42 U.S.C.A. Sec. 4102(1). If children under the age of seventeen (24 P.S. Sec. 13-1326) were not impressionable and immature, why would there be a need for the compulsory attendance laws in the first place?

Finally, the Court is asked to take judicial notice of the immaturity and impressionability of children between the ages of fourteen and eighteen.

Thus, the Courts of Appeals in the case at bar, Brandon, Lubbock, Johnson, and Nortowicz, supra, have based their conclusions on the fact that imma-

ture and impressionable youngsters are likely to view religious exercises carried on in State buildings during the hours of compulsory attendance with teacher supervision as endorsement and promotion of the activity by the State. All of the objective criteria set forth supra, are also likely to give an understanding to a youngster that the State endorses and promotes the activity. See also the case of Stone v. Graham, 499 U.S. 39 (1980) which prohibited the displaying of the Ten Commandments in the public school.

Congress itself in the Equal Access Act has paradoxically admitted the impressionability and immaturity of children between the ages of fourteen and eighteen when it took the position that

students were too young and impressionable to understand that in barring a religious club, the school is not displaying hostility to a religion, but rather endeavoring to remain neutral. S. Rep. No. 357, 98th Cong., 2d Sess. 36 (1984) "this committee finds that students reasonably perceive the denial of access for religious speech as State hostility toward religion". The notion of reverse perception, hostility to religion, as being relevant to the establishment considerations has been rejected by this Court. Epperson v. Arkansas, 393 U.S. 97 at 106; Abbington v. Schempp, 374 U.S. 203, 225 (1963).

2. TEACHERS ARE ROLE MODELS AND PROSELYTIZATION WILL OCCUR.

Petitioners argue that the teacher/monitor is no more than a

"policeman in the park". (Brief for Petitioners, p. 39. Petitioners misconceive the nature of the teacher-student relationship and do the same diservice with such an assertion. A teacher is continually with the students, on a day to day, week to week, month to month and year to year basis. Their relationship is not casual, and the term applied to the teacher-student relationship of "in loco parentis" is apt. Teachers are by and large caring and concerned individuals whose feelings are reciprocated by their students. Naturally, not every teacher is ideal, but to reduce the teacher to the status of "policeman in the park", is to denigrate the relationship and the profession.

One has only to remember one's

own school days to understand the role model nature of a teacher. What will a student think when he sees his teacher supervising the club? Will the thought of obtaining a better grade influence a decision to join the club? Will he be influenced to join the club simply because the teacher is a role model? Respondent believes the answer to these questions is yes. But this type of subtle proselytization is not the only proselytization that will go on in the public schools.

If Petitioners are correct in their position on the open forum, then overt and organized proselytization should be allowed. McDaniel v. Paty, 435 U.S. 613, 626 (1978). Free exercise rights have been associated with tradi-

tional public forums. Cantwell v. Connecticut, 310 U.S. 296 (1940). Petitioners argued in the District Court that they had a right to free exercise of religion, but did not appeal or argue in the Court of Appeals on this ground. This undercuts their position on open forum status discussed, infra.

However, there is one form of proselytization in addition the more subtle teacher role model type of proselytization which will be present in the high school if the proposed activity is permitted, and that is that it is impossible to prevent students from going one-on-one with each other in the public school setting. This was iterated by Mr. Seevers, counsel for Petitioners, in his statement to the Williamsport Sun-Gazette

(Respondents' Brief in Opposition to Petition for Certiorari, Page 4).

Finally, it is the command of religion that its adherents proselytize.[11] While the nature of politics may be compromise, the nature of religion is not. This is the teaching of the First Amendment, that the government shall not seek to interfere with religion, because a religious belief cannot be compromised unless its adherent changes his belief. The fabric of

[11] The Bible, King James Version (1611) New Testament the Gospel according to Saint Matthew, Chapter 28 verses 18, 19 and 20

"And Jesus came and spake unto them, saying, All power is given unto me in heaven and on earth"; 19 - "Go ye therefore, and teach all nations, baptising them in the name of the Father, and of the Son and of the Holy Ghost"; 20 - "Teaching them to observe all things whatsoever I have commanded you; and, low, I am with you always, even unto the end of the world, amen".

society beneath the mantle of the Constitution with respect to religion is very thin. Where religious beliefs and the State collide, society can be torn apart, e.g. the American Civil War.

3. THE STUDENTS HAVE ALREADY BEEN ACCOMMODATED.

Far from showing hostility to the students in this case, the attempt on the part of the school district to provide release time for the students for their religious activity indicates anything but hostility towards religion, objectively and subjectively. In fact, if the students are unable to accept the accommodation provided for by this Court in Zorach v. Clouson, 343 U.S. 306 (1952), then to permit the activity as proposed would exacerbate the notion of

special treatment being given for young and impressionable children.

C. THE POLICY PRODUCES EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION.

Compulsory attendance laws and financial aid in the form of building, heat and light, are also indicia of the presence of excessive entanglement prohibited by the third Lemon test, supra. However, it is the addition of teacher supervision and monitoring to the special nature of the proposed activity that creates the greatest and continuing problems of excessive entanglement between religion and government. In addition, the proposed activity will inevitably create devisiveness and religious domination of the forum.

The Appellate cases, including

the case at bar, Brandon, Lubbock and Johnson, supra, held that there was excessive entanglement in violation of the third Lemon prong.

1. TEACHER SUPERVISION.

The equal access approach being attempted in the case at bar of voluntariness, student initiation and lack of access to the media necessitates a continuing monitoring by the government to ensure the retention of these special characteristics. This would be in the form of the teacher/monitor, as proposed in the case at bar. But there will be further monitoring needed to ensure that the teacher remains only a monitor and not an advisor as is provided for every other club.

The notion that the teacher will

not be drawn into the activities of the entity is simply unworkable. What is to hap-pen if one of the students in the club disagrees with the prayer to be prayed and requests that it not be done? Who will decide in the event of a disagreement? Every other club has a teacher to give direction and advice, but not the special entity proposed; nor has there been any proposal by Petitioners for the resolution of such disputes.

As was said in the Lemon case, 403 U.S. at 620, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-idiological role gives rise to entanglements between church and State".

2. DIVISIVENESS

One of the principal objects to

be obtained by the separation of church and State is the eschewal of strife and division among religions. Mueller v. Allen, 103 Supreme Ct. 3062, 3069 citing Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973). McCollum, 330 U.S. at 231 (Frankfurter, J., concurring).

The Circuit Court in the case at bar indicated that instead of uniting students from varying backgrounds and beliefs, prayer in the public schools segregates students along religious lines. Respondent agrees.

3. RELIGION WILL DOMINATE THE CLUB SYSTEM.

The case of Widmar v. Vincent, 102 S. Ct. 269 at 277, indicates that if there were emperical evidence that religious groups would dominate the forum,

the advancement of religion would be the forum's "primary affect". Emperical evidence may be present in the case at bar by the number of religious groups that have filed amicus briefs on behalf of the Petitioners in this matter. If the Evangelical persuasion is permitted entry into the club system, can the Roman Catholic, Jews and other Protestant denominations stay out? If for no other reason than the protection of their children from proselytization, it is submitted these groups would have to become a part of the club system.

Williamsport has some eighty and more different churches and synogogues covering an extensive spectrum of religious beliefs. If only a third of these religions seek admission to the club

system, the forum would be comprised more of religious clubs than any other kind. Also, Williamsport is the hometown of the students, where churches are in competition with each other for members. Does one suppose that the audience of some one thousand seven hundred fifty students provided by the compulsory school laws of Pennsylvania at the Williamsport High School would be eschewed, when students belonging to other churches had their clubs in the forum? It is submitted that religious domination of the forum would be the natural result of permitting the proposed activity. Such being the case, further excessive entanglement between religion and government is inevitable.

D. THE PURPOSE TEST.

Respondent had originally been inclined to concede the argument on the purpose test to Petitioners in view of prior cases before this Court such as Widmar v. Vincent, Supra. However on reflection, Respondent submits that it is the amended statute (policy) that should be primarily focused on when dealing with a religious situation whose effect is more than de minimus, such as was the case in Lynch v. Donnelly, Supra., or where the statute (policy) is justified by historical considerations, Widmar v. Vincent, supra, Marsh v. Chambers, 103 S. Ct. 3330 (1983), or such other exceptions as from time to time this Court may enunciate. Whatever the case with respect to de minimus situations, the case at bar is not de minimus. If such analysis

were adopted, then the holdings in Wallace v. Jaffree, supra, and Widmar v. Vincent, supra, could be reconciled.

The United States and the Petitioners have both used the Equal Access Act (20 U.S.C. Sec. 4071, et seq) in their Briefs in an attempt to justify a holding for Petitioners in this case. Both Petitioners and the United States concede that the Equal Access Act is inapplicable to the facts of this case, since this case was decided before the Equal Access Act was passed. What then is its relevance to this case? The United States says in its Brief (p. 2) that it is the implications of the case at bar for the Equal Access Act that are its primary consideration. The Petitioners say in their Brief (p. 34)

that facts found by Congress with respect to the maturity and impressionability of children in secondary schools should be adopted in this case.

Respondent believes that under Respondent's analysis supra, the Equal Access Act may be controlled by the case of Wallace v. Jaffree, supra. A look at the legislative history of the Equal Access Act indicates that it is almost entirely devoted to the subject of religion, and that the subject of free speech was an afterthought, perhaps in an attempt to give the statute some secular purpose or to gather enough votes for passage. However, the primary focus was upon religion. Of the U.S. Code Congressional Administrative Legislative History, No. 7, September, 1984, pp.

2349-2396 incl., almost all consideration is given to religion. Speech merits a few lines in 47 pages. Not only was the purpose almost entirely religious in nature, but the primary affect of the statute is to advance religion, i.e. get prayer back in the schools. The language of the statute reads like the District Court Opinion in the case at bar, and the statute was modeled on the District Court's Opinion. Not only is the primary effect of the Lemon test violated, but so is the excessive entanglement test for all of the reasons set forth, supra, with respect to the discussion of entanglement. Put another way, this statute could be titled the "Unequal Access Act", because of its provision saying that no teacher has to

monitor any club with the principals of whom the teacher happens to disagree (Sec. 802(d)(4)). Does that mean that when the B'Hai Club wants access to the club situation, then unless some teacher who agrees with the B'Hai principals can be found, there is no club? Respondent submits that this is exactly what will happen. Those minority religions who have very few adherents will not have access to the club system because they will have no one to monitor their club. In this day of both working fathers and working mothers, it is no answer to say that one of the parents can come in to monitor this situation. Parents, in many cases, will be unavailable as monitors. Also, the problem of the teacher taking part in the activity would be exacerbated

by having the "monitor" be an adherent of the faith involved.

II. WILLIAMSPORT AREA SCHOOL DISTRICT HAS NOT CREATED A FREE SPEECH RIGHT IN MEMBERS OF THE PROPOSED ACTIVITY TO CONDUCT ORGANIZED RELIGIOUS EXERCISE DURING THE CLUB PERIOD AT WILLIAMSPORT AREA HIGH SCHOOL.

Petitioners' position rests on two propositions.

1. That an open forum (limited) was created by the school district in the manner in which the club system was set up.

2. Having created an open forum (limited), there can be no content based discrimination against speech in that open forum.

In more stark terms, the Williamsport Area School District has created a public park for undiscriminate

student expression. This argument is unsound, because it is based on two fallacies:

1. A misconception of the purpose of the secondary public school system.

2. A misconception of what actually was done at the Williamsport Area High School by the district.

The Court of Appeals held that there was an open forum because of the principal's statement that his policy regarding proposed new clubs was that "any student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legally and constitutionally proper would likely (emphasis supplied) be approved as

an officially sponsored and sanctioned school activity" (J.A. 104) 741 F. 2d at 544, 548. The Court then indicated that this standard was "so broad that virtually any program which can be said to benefit the development of the students is permissible (ibid. at 549-550). Second, no club, in the memory of the principal, had ever been denied school sponsorship until this case (ibid 543, 548). Finally, several of the activities were viewed as not being directly related to the curriculum, (ibid. at 549). These clubs were the Key Club, Chess Club, Aviation Club and Office Aides. 741 F. 2d at 549, note 18. Two of these clubs, the Key Club and Office Aides, were in existence at the time of the request for permission in this case (J.A. 120, 131

(Key Club), 141 (Office Aides)). The Chess Club and Aviation Club were not in existence, but had been permitted in the past (P. App. 8a).

While one of these clubs (Office Aides) could be described as being directly related to the commercial curriculum of the high school, the others could be described as being indirectly related to the curriculum; (Key Club-inculcation of the traditional secular values of service); (Chess Club-promotion of logical thought); (Aviation Club-inquiry into new areas of knowledge)[12]

[12]Respondents' review of the student year book, La Mamoire, beginning at 1920, indicates that the Aviation Club first appeared in 1930.

What does appear from a review of the clubs that have been permitted (J.A. 109-141) is that they are uncontroversial and not designed for advocacy. Further, they are designed to have an advisor for the purpose of education.

A. NO OPEN FORUM WAS CREATED.

The general rule is that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated", Greer v. Spock, 424 U.S. 828 at 836, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976); Adderly v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966). There are two exceptions to this rule:

1. When, by long tradition of

government fiat, the property has been devoted to public assembly and debate such as public sidewalks or parks Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983).

2. Where the State has, by its actions, made the property generally (emphasis supplied) open to the public even if it was not required to do so in the first place, Perry Education Association, supra, 460 U.S. at 45. This type of forum may be limited in the sense that it is limited to a particular group such as students. Perry Education Association, 460 U.S. at 46 footnote 7.

The first exception is not involved. The Petitioners make no argument that it is involved, and the Court

has never "suggested that students, teachers or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for... unlimited expressive purposes." Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972). Absent a public forum, the government may discriminate between partisan, political and other speech. Greer v. Spock, 424 U.S. 828 (1976). Absent a public forum, government may discriminate between commercial and other speech, Lehman v. Shaker Heights, 418 U.S. 298 (1974). This power to discriminate on a content based approach is stated in Perry Education Association, Supra., 460 U.S. at 45-47. Under this formulation, unless the forum is generally open (emphasis

supplied) and available for indiscriminate (emphasis supplied) use, 460 U.S. at 45, 47, no open forum, limited or otherwise, is created. This may otherwise be characterized as the "soap box in the park", United States Postal Service v. Counsel of Greenburgh Civil Associations, 453 U.S. 114, 131, 132 (1981).

No "soap box in the park" or a forum for indiscriminate use and generally open was created in the case at bar. First, a review of the permitted clubs indicates that they were non-controversial in nature (J.A. 109-141). Second, the clubs were also compatible with the mission of the secondary public school - education and the inculcation of traditional values. The club system as it operates at the Williamsport Area High

School can be described as made up of clubs which are non-controversial, non-divisive, are either directly related to the curriculum, teach educational skills (logical thought-Chess Club) or examine frontiers of knowledge not yet integrated into the curriculum (Aviation Club, Ecology Club). While this access is selective, it does not transform the club system to make it generally open for indiscriminate use. Perry Education Association, supra, rejected the argument that a public school system's internal mail system had become a public forum merely because certain "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations" have used it with school officials' permission. "This type of selective access

does not transform government property into a public forum", 460 U.S. at 45, 47. Any right of access created by this selective access "would in any event extend only to other 'groups'... of similar character", 460 U.S. at 45, 48.

The basic purpose of a public secondary school is not to create a "soap box in the park". Its basic purpose is education subject to local control, Board of Education v. Pico, 457 U.S. 853, 863-864 (1982) (plurality opinion) (citations omitted), and further the inculcation of fundamental values necessary to the maintenance of a democratic political system. Thus, the Supreme Court has agreed:

> that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is a

> legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political." Board of Education v. Pico, 457 U.S. at 864 (plurality opinion) (citations omitted).

Pico, 457 U.S. at 864 (plurality opinion) (citations omitted). Accord, e.g., id. at 876 (Blackmun, J., concurring in part and in judgment) ("[b]ecause of the essential socializing function of schools, local education officials may attempt 'to promote civic virtues'...and to 'awake[n] the child to cultural values'") (citations omitted); id. at 889 (Burger, C.J. dissenting); id. at 896 (Powell J., dissenting); id. at 909 (Rehnquist, J., dissenting); Plyler v.Doe, 457 U.S. 202, 221-23 (1982).

Although the standard used by the principal is a broad one, it does not

indicate that the school district wanted to give up control of the club system to any speech protected anywhere by the First Amendment. This is indicated by the fact that when the first club of a controversial nature asked for permission, i.e. this case, the principal turned to the school board for direction. Secondly, the principal himself indicated that the chances for admission were only "likely" and not absolute (J.A. 104). Additionally, every other club had an advisor to give direction and advice to the club. Far from making the club system a "soap box in the park" type situation, there was and is substantial control and direction by the school district. The reasoning of the Court of Appeals that no student club had been

denied permission in the memory of the principal, 741 Fed. 2d 543, 548, is only indicative in this situation that no "soap box in the park" type of club had yet applied for permission. The hard cases have simply never been presented. However, based on what the principal did in this case (send the matter to the school board for determination) that matter would not be determined solely by the principal, but would be determined by the school board as provided by law, 24 P.S. Sec. 511.

The burden of proof that an open forum was created at the Williamsport Area High School is on the Petitioners in this case Perry Education Association v. Perry Local Educators Association, 460 U.S. 37 (1983). If they fail in that

burden, then the decision of the Circuit Court should be affirmed because Petitioners have not proved a free speech right to religious exercise in the club system at Williamsport Area High School.

The suggestion of the Petitioners in their Brief, page 17, footnote 16, that even if there is no public forum in the case at bar, nevertheless a content-based exclusion from the period is permissible only if it is reasonably necessary to further legitimate State objectives does not accurately state the law. Absent a public forum, the cases do not indicate that the State must articulate its reasons for denying access at the time of denial, or that it bears the burden of proving, particularly in an evidentury sense, that

the denial is "reasonable". See, e.g., Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 50-55 (1983); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974); CF. Minnesota Board for Community Colleges v. Knight, 52 U.S. Law Week 4204, 4207-4210 (U.S., standard 1984). Rather, these cases indicate that the standard is the same as under ordinary equal protection or due process analysis, and the question is whether some legitimate reason for the governmental decision is reasonably apparent. The Petitioners should be entitled to summary judgment only if they come forward with some evidence that there is no unarticulated, but legitimate educational or other reason for the denial. This

Petitioners have failed to do.

The United States in its Brief at 2-3, note 3, attempts to finesse this issue with its statement that Petitioners' free speech rights "are at least as broad as their rights under the [Equal Access] Act". One wonders why Congress then went through the useless exercise of enacting it if the government is right in this contention.

B. WIDMAR v. VINCENT DOES NOT CONTROL THIS CASE.

The case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 770 L. Ed. 2d 440 (1981), is distinguishable from the case at bar. First, in Widmar, it was conceded that there was a public forum. The Court repeatedly stated that the university facilities had been made "generally available" for student activi-

ties and were a "generally open forum", 454 U.S. at 264, 267, 268, 269, 274, 277. Historical reasons as well as what activities were going on made the forum generally open. The forum was open to all kinds and types of discussions, including political discussion. No one was compelled to be at the university. No supervisor of the group was required. And the Court specifically distinguished the case from a high school situation on the grounds of maturity and non-impressionability.

The public secondary school system is a much more structured institution than the university. Why? Because children between the ages of fourteen and eighteen, while sophisticated in some ways simply are still immature and

impressionable. This was recognized by this Court in the Widmar case, in footnote 14, 102 S. Ct. 269, at 276. That conclusion was right when the members of this Court were youngsters; it was right when Tilton and Richardson, supra, was decided; it was right when it was set forth in the Widmar case and it is right today.

C. THE CURRICULUM-RELATED STANDARD OF THE COURT OF APPEALS IS NOT THE STANDARD FOR DETERMINING WHETHER AN OPEN FORUM HAS BEEN CREATED.

The reasoning of this Court in the case of Perry Education Association, supra, is set forth in A of this part of the Brief. There is another significant reason for not burdening public education in the secondary and elementary schools with a curriculum-related standard for allowing a club

activity to exist. That is the fact that there are educational skills which are not taught as a subject for credit in the curriculum. With the expansion of knowledge in the world today, there is hardly time for the teaching of subjects of knowledge, let alone having a separate class for the development of educational skills. It would be a great loss to education if clubs like the Chess Club could not be permitted without creating a "soap box in the park" situation in the public schools. Already schools in this country are closing down their activity periods to solely curriculum-related subjects. What does this say for the future, as new areas of knowledge become known, but not curricularized in the subject matter of a high school education? The choice of a

"soap box in the park" atmosphere or a strictly curriculum-related activity period is a Catch 22 situation for education. Respondent has been involved in the intricacies of trying to make additions and changes to curriculum. These things do not occur without great thought, planning and considerable expenditure of time. When Respondent first was elected to the school board, he found that from conception to implementation of an idea, it took approximately six years. This time span has been shortened somewhat since 1973, but it is a wrenching experience for school administration. To deprive children of new frontiers of knowledge via clubs simply because there is not yet a curriculum subject concerning that area of

knowledge, is not only anti-education, but lacking in wisdom. On the other hand, if Petitioners are right, then the choice is between curriculum- relatedness on the one hand and a "soap box in the park" atmosphere on the other. No matter what happens, education loses.

III. THE ALTERNATIVE SUGGESTED BY PETITIONERS FOR PERMITTING THE ACTIVITY WOULD NOT ALTER THE VIOLATION OF THE ESTABLISHMENT CLAUSE PRESENT.

Petitioners suggest that a sign on the door disclaiming any intent to advance religion. This solution, if it weren't met with laughter, would put the school district in the position of dissembling, because advancing religion is exactly the purpose of the activity, and with the Equal Access Act now law, the perception of students, both objec-

tively and subjectively, would be that the assertion was patently untrue. Petitioners argue that education is a wholesome alternative to censorship (Petitioners' Brief, page 43), but education concerning the intent of the government with respect to religious clubs, if it implied that there was no intent to aid or advance religion would be untrue, and therefore very unwholesome. Petitioners also have never requested an alternative based on education. The suggestion of the Petitioners (Petitioners' Brief, page 43), that no monitor need be required, eschews the liability problems associated with a lack of supervision during school hours.

Finally, the school district in this case offered the alternative which

has been approved by this Court of released time. Zorach, supra. To suggest that somehow released time amounts to hostility to religion under the circumstances of the case at bar, is unfair both to religion and to the school district. Alternatives were considered by the District Court, although the District Court did not impose a monitor on the activities of the club as opposed to an advisor. (P. App. 99a, 100a).

The suggestion of the Petitioners that the burden under the Establishment Clause was placed on Petitioners is not supported by any discussion and therefore cannot be responded to, except to say that for the reasons set forth in Argument I above, Respondent does not believe that the bur-

den was placed on Petitioners in this case.

IV. ASSUMING THAT AN OPEN FORUM WAS CREATED, THE COURT OF APPEALS' REASONING WITH REGARD TO RESOLVING THE CONFLICT BETWEEN THE FREE SPEECH AND ESTABLISHMENT CLAUSES SHOULD BE ADOPTED.

In the Zorach v. Clossun case, supra, this Court held that where Establishment Clause problems and free exercise of religion problems co-existed, they could be resolved by providing an alternative for the free exercise of religion. This was the released time concept. Thus, there is a basis for resolving any conflict between two constitutional clauses because of the alternative opportunities available for the resolution of one or the other problems. There is no evidence of any intent on the part of the Williamsport

Area School District or anyone else to prevent the free exercise by Petitioners of their religion. In fact, accommodation has been made to provide for just such exercise. This accommodation also provides for speech, religious speech, for Petitioners. Thus, the Appellate Court was correct in its Resolution of the conflict between the free speech and establishment of religion clauses, if this Court holds that an open forum generally open for indiscriminate speech was created and that the Establishment Clause is also violated.

Finally, if the Establishment Clause issue is resolved in the Respondents' favor, Respondent urges the Court to also resolve the free speech issue. School districts need to know

where they stand on this matter. Many school districts, if they were presented with the Catch 22 choice of allowing the Nazi Club or limiting the clubs to purely curriculum-related clubs, would choose the later. This would do great harm to education. The issue is fairly presented in this case, although Respondent concedes that a decision on either issue in Respondents' favor would effectively affirm the Circuit Court of Appeal's conclusion.

CONCLUSION

The judgment of the Court of Appeals that the proposed activity not be permitted should be affirmed on two separate grounds:

1. That permitting the activity would violate the Establishment Clause.

2. That an open forum was not created under the circumstances in the case at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that 40 copies of the within Brief for Respondent on Writ of Certiorari to the United States Court of Appeals for the Third Circuit has been served upon the Supreme Court of the United States by placing same in the U.S. Mail, first class, postage prepaid on the 28th day of June, 1985.

The undersigned also certifies that 3 copies of the within Brief has been served upon Samuel Ericsson, Esquire, Christian Legal Society, 6901 Braddock Road, Springfield, Virginia, 22151, by placing same in the U.S. Mail, first class, postage prepaid, the 28th day of June, 1985.

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